IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT
No. 8, *et al.*,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF WISCONSIN

BRIEF AMICUS CURIAE ON BEHALF OF THE UNITED STATES CONFERENCE OF MAYORS, URGING REVERSAL

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TABLE OF CONTENTS

Page

ARGUMENT 2

I. THE DECISION IN THE CASE AT BAR COULD HAVE A SUBSTANTIAL IMPACT ON OUR NATION'S MAYORS. THE UNITED STATES CONFERENCE OF MAYORS IS THE ONLY ORGANIZATION WHICH CAN EFFECTIVELY REPRESENT THE COLLECTIVE INTERESTS OF THESE LOCAL OFFICIALS 2

A. The United States Conference of Mayors has been the representative organization for the Mayors of our nation's largest cities since 1933 2

B. As the Chief Elected Official and as the Chief Executive Officer of local government, Mayors would be significantly affected in performing the duties of these often conflicting roles by an affirmance of the Wisconsin Supreme Court decision 3

II. PRIVATE SECTOR LABOR LAW CONCEPTS OF EXCLUSIVITY CANNOT BE PROPERLY INTERPRETED TO PROHIBIT COMMENTS FROM INDIVIDUAL TEACHERS AND MINORITY UNIONS DURING PUBLIC SCHOOL BOARD MEETINGS 6

A. The history of the "Exclusivity" principle in the private sector relies upon the need for peace in the collective bargaining process and the need to protect the right to organize collectively 6

Page

B. Blind application of private sector concepts of exclusivity to public sector labor relations, without adequate consideration of the different obligations imposed in each, is improper, and may result in the imposition of significant burdens on the exercise of First Amendment rights by public employees 8

C. The facts of the present case accurately illustrate the problems of balancing these rights and obligations at the interface of constitutional and labor relations principles 11

1. While the state has a legitimate interest in stable labor relations in the public sector, the "clear and present danger" cases are not the appropriate cases for defining the extent to which that state interest may be invoked to infringe on constitutional rights 11

2. The significance of the public forum and the need for protection of vigorous comment on issues of public importance require that the solution to the case at bar include the most extensive protections available for First Amendment rights 15

3. As an agent of the state, the Madison School Board is obligated to treat all citizens who participate in a public meeting, regardless of their employment status or their union status, equally. The decision of the Wisconsin Supreme Court in this case would require the School Board to violate this responsibility 19

Page

III. BOTH IN TERMS OF VIOLATING FIRST AMENDMENT RIGHTS OF FREE SPEECH, PETITION AND ASSOCIATION, AND IN TERMS OF THE PRACTICAL APPLICATION OF LABOR LAW PRINCIPLES TO THE PUBLIC SECTOR, THE DECISION OF THE WISCONSIN SUPREME COURT MUST BE REVERSED 21

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Adderly v. Florida, 385 U.S. 39 (1966) 14

Amalgamated Federal Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) 15

Avondale School District Board of Education, 1968 Mich. L.M.B. Ops. 518 20

Board of School Directors v. Wisconsin Employment Relations Commission, 42 Wis. 2d 637, 168 N.W. 2d 92 (1969) 20, 23, 24, 26

Borreca v. Fasi, 369 F. Supp. 906 (U.S.D.C., D.Ha.) (1974) 3

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 21

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 3

Cafeteria & Restaurant Workers, Local 473 v. McElroy, 365 U.S. 886 (1961) 10

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 13

Cox v. Louisiana, 379 U.S. 536 (1965) 5, 16

Cox v. New Hampshire, 312 U.S. 569 (1941) 16

Dennis v. United States, 341 U.S. 494 (1951) 14

Edwards v. South Carolina, 372 U.S. 229 (1963) 18

Ex parte Virginia, 100 U.S. 339 (1880) 19, 21

Garrity v. New Jersey, 385 U.S. 493 (1967) 12

Page

Grayned v. City of Rockford, 408 U.S. 104 (1972) 17

Gregory v. Chicago, 349 U.S. 111 (1969) 3, 5, 18

Hague v. CIO, 307 U.S. 496 (1939) 15

Healy v. James, 408 U.S. 169 (1972) 25

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 10, 12

Lombard v. Louisiana, 373 U.S. 267 (1963) 21

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) ... 15

Marsh v. Alabama, 326 U.S. 501 (1946) 15

Medo Photo Supply Corporation v. National Labor Relations Board, 321 U.S. 678 (1944) 7

Michigan City Federation of Teachers, Local 399 v. Michigan City Area Schools, Civ. No. 72594 (N.D. Ind.), Jan. 24, 1973 25

Milwaukee Teachers Union, Dec. No. 6995-A (Wisconsin Employment Relations Board, March 24, 1966) 22, 23

NAACP v. Alabama *ex rel* Patterson, 357 U.S. 449 (1958) 13

New York Times v. Sullivan, 376 U.S. 254 (1964) 16, 17

Pickering v. Board of Education, 391 U.S. 563 (1968) . 3, 10, 12, 14, 16, 22

Police Department of the City of Chicago v. Mosley, 408 U.S. 92 (1972) 17

Railway Employes' Department v. Hanson, 351 U.S. 225 (1956) 19

Schenck v. United States, 249 U.S. 47 (1919) 13, 14

Shapiro v. Thompson, 394 U.S. 618 (1969) 19

Shelley v. Kramer, 334 U.S. 1 (1948) 3

Shelton v. Tucker, 364 U.S. 479 (1960) 12, 13

Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) 19

Tassin v. Local 832, National Union of Police, 311 So. 2d 591 (La. App., 1975) 3

Page

Tinker v. Des Moines School District, 393 U.S. 503 (1969). 13, 14, 17,

Thomas v. Collins, 323 U.S. 516 (1945) 21

United States v. Classic, 313 U.S. 299 (1941) 21

United States v. O'Brien, 391 U.S. 367 (1968) 14, 15

Virginian Railway v. System Federation No. 40, 300 U.S. 515 (1937) 20

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 14

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 21

Statutes:

Internal Revenue Code of 1954, 26 U.S.C. 501(c)(3) 2

National Industrial Recovery Act of 1933, 48 Stat. 213 7

National Labor Relations Act, 49 Stat. 449 as amended, 29 U.S.C. § § 141 *et seq* 7

Wisconsin Municipal-Employment Act, Wis. Stat., § 111.70 *et seq* 22

Wisconsin Statutes, 1971, § 14.90 (1) and (2) 25

Wisconsin Constitution, Article I, section 4 25

Miscellaneous:

Attorney General of Massachusetts, Letter to Com'r of Education, September 12, 1967 26

Comment, "Public School as Public Forum," 54 *Tex. L. Rev.* 90 (1975) 15

Hearings before the Committee on Education and Labor on S. 1958 74th Cong., 1st Sess. (1935) Pt. 2 8

Final Report, The Rockefeller Committee on Public Employee Relations, March 31, 1966 9

McQuillin, *Municipal Corporations* (3rd Ed.) (1973) 3, 4

Note, "The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment," 55 *Cornell L. Rev.* 1004 (1970) 10

Page

Schatzki, "Majority Rule, Exclusive Representation, and the Interests of the Individual Workers: Should Exclusivity Be Abolished?" *U. Pa. L. Rev.* 123:897-938 (April 1975) 7

Shaw and Clark, "The Practical Differences Between Public and Private Sector Collective Bargaining," 19 *U.C.L.A. L. Rev.* 867 (1972) 16

Stone, "Fora Americana: Speech in Public Places," 1974 *Supreme Court Review* 233 16

Wollett and Chanin, *The Law and Practice of Teacher Negotiations*, The Bureau of National Affairs, Washington, D.C., 1970 26

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BRIEF AMICUS CURIAE ON BEHALF OF THE UNITED STATES CONFERENCE OF MAYORS, URGING REVERSAL

Pursuant to Rule 42 of the Rules of this Court, and with the consent of all parties, witness whereof has been made to this Court, the United States Conference of Mayors files the annexed brief *amicus curiae*, urging that the decision of the Supreme Court of Wisconsin be reversed.

I.

THE DECISION IN THE CASE AT BAR COULD HAVE A SUBSTANTIAL IMPACT ON OUR NATION'S MAYORS. THE UNITED STATES CONFERENCE OF MAYORS IS THE ONLY ORGANIZATION WHICH CAN EFFECTIVELY REPRESENT THE COLLECTIVE INTERESTS OF THESE LOCAL OFFICIALS.

A. The United States Conference of Mayors has been the representative organization for the Mayors of our nation's largest cities since 1933.

The United States Conference of Mayors is an organization of city governments represented through their chief elected official, the Mayor. It was organized in 1933 to promote the causes of the city, to foster responsible and effective relationships between city halls and the federal government, and to insure that local governments be responsive to the needs of their citizens and versed in municipal administration. The Conference of Mayors is the national forum through which our larger cities express their concerns and work to meet the needs of urban America.

By limiting participation and membership to the 750 cities over 30,000 population, the Conference of Mayors can focus its efforts on major urban issues and has become a unique national spokesman.

The United States Conference of Mayors is a not-for-profit membership corporation organized under the laws of the State of Illinois, and section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3).

B. As the Chief Elected Official and as the Chief Executive Officer of local government, Mayors would be significantly affected in performing the duties of these often conflicting roles by an affirmance of the Wisconsin Supreme Court decision.

As the Chief Elected Official of a municipality, the Mayor is the embodiment of local government. *Tassin v. Local 832, National Union of Police*, 311 So. 2d 591 (La. App., 1975). In performing this role the Mayor is necessarily required to meet with members of the public on all matters concerning the affairs of government. For example, in the submission of a petition to local government, it is in most cases sufficient in law to deliver the petition to the Mayor. *Id.*, and see E. McQuillin, *Municipal Corporations* (3rd Ed) § 12.43 (1973) [hereinafter cited as McQuillin].

In addition to the usual ministerial and administrative tasks of the Mayor, as the Chief Elected Official, like other public officials, he is bound to respect and protect the constitutional rights of citizens. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Gregory v. Chicago*, 394 U.S. 111 (1969). The actions of a Mayor are deemed to be state actions thereby requiring that the exercise of the power of the office of the Mayor be without bias, guaranteeing equal protection of the law for all citizens. *Borreca v. Fasi*, 369 F. Supp. 906 (U.S.D.C., D.Ha.) (1974); *Shelley v. Kramer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The Mayor is also the Chief Executive Officer of the community. While the powers of the Mayor vary in the many jurisdictions of the several states and within the

states, recent charters place great responsibility and power in the office of the Mayor. "This conforms to modern legislative policy relating to the administration of municipal concerns, whereby large authority is reposed in the Mayor who on this account may be held to a high degree of personal responsibility in the administration of the affairs of the city." *McQuillin*, § 12.43. The gradual increase of the powers of the Mayor has proceeded with the development of the concentration of municipal authority in as few officers as possible, to get efficient and quick action.

As the Chief Executive Officer of the city, the Mayor is vested by Charter with the power and authority to exercise all the executive powers of the municipality. These charters make the Mayor the responsible official in employment relationships between city employees and the city government. Under many of these charters the Mayor may also be the chief labor negotiator for the city government and is thereby charged with maintaining the integrity of the collective bargaining process. Finally, the Mayor may be responsible for the continuing operation of the city government including the delivery of municipal services during strikes by municipal employees.

Even a cursory examination of this governmental framework illustrates the potential for conflict between the Mayor, as the Chief Elected Official, a political role, and the Mayor, as the Chief Executive Officer, a proprietary role. The conflict arises because in each of the delineated roles a different standard of conduct is applied, and a different obligation exists. These standards and obligations are not necessarily mutually consistent.

Nowhere is the potential conflict more apparent than in the application of private sector labor law principles to public employment. At the same instant that the Mayor may be required to respect the constitutional rights of citizens, some of whom are public employees, he may also be required to comply with obligations imposed by statute to bargain only with the exclusive representative of public employees. If it could be assured that all public employees would support their union, no conflict would exist. But, public employees, just as any other citizens, disagree, and often, they disagree with the policies of their union. The dilemma for Mayors arises when the public employee wishes to express his dissenting view, both as citizen and employee.

The easy solution, of course, would be to hold that all discussions and presentations regarding matters subject to collective bargaining regardless of the forum fall within the scope of a "compelling state interest", and thus justify silencing of comment. However, the easy solution fails to recognize the importance of the concept of Mayor as the embodiment of local government. The Mayor is the focal point of the community – its image. As such, Mayors represent the community at large, must be available to perform ceremonial duties, and to hear citizens' grievances, as well as to implement administrative directives. The city is the unit of government closest to the citizen, and must be the first to respond to his needs. The Mayor's obligations to respect and support comment on matters of public importance is the primary corollary to his other responsibilities. Failure to carry out this responsibility would certainly cause dissension and can only serve to foment disruption. *Cox v. Louisiana*, 379 U.S. 536 (1965); *Gregory v. Chicago*, 394 U.S. 111 (1969).

In this case, the United States Conference of Mayors seeks to represent the interests of its membership, the nation's Mayors, by clarifying the responsibilities of Mayors and other public officials given the conflicting duties outlined above. In addition, it wishes to impress upon the Court the imprudence of a decision affirming the Wisconsin Supreme Court. In the analysis of the various standards to be applied, the Conference of Mayors will seek to expose the implications of imposing private sector labor relations principles on public employment without consideration of the serious constitutional consequences for Mayors.

II.

PRIVATE SECTOR LABOR LAW CONCEPTS OF EXCLUSIVITY CANNOT BE PROPERLY INTERPRETED TO PROHIBIT COMMENT FROM INDIVIDUAL TEACHERS AND MINORITY UNIONS DURING PUBLIC SCHOOL BOARD MEETINGS.

A. The history of the "Exclusivity" principle in the private sector relies upon the need for peace in the collective bargaining process and the need to protect the right to organize collectively.

In its barest terms, the concept of exclusive recognition means that the union designated by a majority of the relevant employees negotiates collective bargaining contracts on behalf of all employees. In addition to the right granted by exclusive recognition, there is imposed upon the employer a corelative duty

not to negotiate on any matters subject to collective bargaining with any other organization, minority union or individual employee. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944); But see George Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers": Should Exclusivity Be Abolished?" 123 U. Pa. L. Rev. 897-938, Apr. 1975.

The principle of exclusivity became a popular notion during the years between enactment of the National Industrial Recovery Act of 1933 (48 Stat. 213) and adoption of the National Labor Relations Act of 1935, 49 Stat. 449 as amended, 29 U.S.C. §§141 *et seq.* when it became increasingly apparent that employers were exploiting employee fragmentation to their benefit in the collective bargaining process. To alleviate this problem, and to insure some relative strength for employee organizations, exclusive recognition was incorporated into Section 9(a) of the National Labor Relations Act. This addition was also necessary in order to resolve disagreements which arose under Section 7(a) of the National Industrial Recovery Act respecting the manner in which the political representation of employees would be achieved. Section 7(a) itself guaranteed collective bargaining without specifying how representatives would be chosen or whom they should represent. This ambiguity led to disputes not only between employers and unions, but also between various governmental officials as to whether section 7(a) intended plural, proportional, or majority representation.[1] As Francis Biddle, then

[1] Generally, there are three ways in which union representation may be described: plural, proportional or exclusive. Plural recognition means that the organization is the negotiating agent for *its members only*. Proportionate representation, on the other hand, involves the creation of a negotiating council as the representative with each of the organizations having membership on the council *proportionate* to the percentage of the employees who support that organization.

Chairman of the old National Labor Board under Public Resolution No. 44 testified in hearings preceding enactment of the National Labor Relations Act:

> The experience of this Board in the cases before it has indicated that the insistence of the employer on individual bargaining has been for the purpose of interfering with collective bargaining and not for the purpose of preserving the individual liberty of contract of the American workman. *Hearings before Committee on Education and Labor on S. 1958,* 74th Cong., 1st Sess. (1935) Pt. 2, p. 151.

The application of exclusive recognition in the private sector afforded employees through their exclusive agent the opportunity to present a united front to employers during the bargaining process. In addition, a union cloaked in the mantel of exclusivity carried with it the authority and power to leverage negotiations. The exclusivity principle diminished the employer's ability to play various organizations or individual employees off against one another, thus enhancing the relative strength of employee unions.

In the private sector, therefore, the concept of exclusivity was proven successful in minimizing organizational disputes, maximizing the efficiency of the collective bargaining process, and solidifying the position of labor unions *vis a vis* management.

B. Blind application of private sector concepts of exclusivity to public sector labor relations, without adequate consideration of the different obligations imposed in each, is improper, and may result in the imposition of significant burdens on the exercise of First Amendment rights by public employees.

A conclusion drawn by the Rockefeller Committee on Public Employee Relations (The Taylor Committee) in March, 1966 reflects the enthusiastic, but ill-considered, application of private sector labor law principles to the public sector without adequate review of the constitutional implications of such a transplant:

> We find a number of advantages in the use of the principle of recognizing a majority organization as exclusive representative for all employees in the unit. There are advantages in the elimination of the possibility that the executives of an agency will play one group of employees or one employee organization off against another. There are advantages in the elimination, for a period, of inter-organizational rivalries. There are advantages in discouraging the 'splitting off' of functional groups in the employee organization in order to go it on their own. There are advantages in simplifying and systematizing the administration of employee and personnel relations. These are advantages in an organization's ability to serve all the employees in the unit. *Final Report* 29 (March 31, 1966).

Certainly, no one can contest that when considered from the perspective of labor peace, efficient collective bargaining, and union status, exclusive recognition makes as much sense in the public sector as it does in the private sector. But from the perspective of individual rights and protected constitutional conduct, exclusivity in public employment can be resisted as undemocratic. Supporters of the principle will undoubtedly argue that in the political arena, the Senator, Congressperson or other official selected by the majority represents all members of the particular voting district. However, this analogy cannot be drawn too far, for similarly in the political sphere, minority groups and individuals retain certain rights – to petition, to

protest, to assemble peaceably, to criticize, and to campaign for a replacement. To the extent that the exclusive recognition is adopted in public employment, there is a commensurate diminution in the freedom of individual employees in a governmental unit. Because, upon adoption of an exclusive recognition policy, the state will be acting not only in its traditional regulatory role, but also in the role of employer, a zone of protection for the organizational, representational, and individual rights of members of a minority organization should be scrupulously formulated. "The alternative could be the unnecessary, unjust and perhaps unconstitutional subversion of individual employee and minority union rights in public employment." "The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment," 55 *Cornell L. Rev.* 1004, 1005-1006 (1970).

Because of the dual role the state plays in public sector labor relations – that of regulator and employer, the wholesale application of the exclusivity principle may not be applicable or proper. As regulator, that is the constitutionally constructed authority to serve the needs and will of the people, the state is obligated to preserve and equally protect the constitutional rights of its citizens, including public employees, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Pickering v. Board of Education*, 391 U.S. 563 (1968), and, does "not constitutionally have the complete freedom of action enjoyed by a private employer." *Cafeteria & Restaurant Workers, Local 473 v. McElroy*, 367 U.S. 886, 897-98 (1961). Employers in the private sector have no corresponding duty, and may, therefore, place the goal of successful labor negotiations above all others, including restraints on individual conduct. The

affirmative obligation to protect the individual's right to speak, assemble and petition is not imposed upon private employers.

As employer, on the other hand, the state is obligated by statute to participate in the collective bargaining process as management for the state administrative and political framework, and to extract the most efficient and financially sound agreement.

These obligations are not always mutually consistent, as the case at bar demonstrates, and the public official is placed in the unenviable position of reconciling responsibilities under constitutional and labor law. Thus, unlike the private sector, where the primary motivation and rationale for labor law principles is successful collective bargaining, application of the exclusive recognition concept in the public sector requires a balancing of substantial constitutional interests and duties against compelling state interests in achieving efficient and peaceful labor relations.

C. The facts of the present case accurately illustrate the problems of balancing these rights and obligations at the interface of constitutional and labor relations principles.

1. While the state has a legitimate interest in stable labor relations in the public sector, the "clear and present danger" cases are not the appropriate cases for defining the extent to which that state interest may be invoked to infringe on constitutional rights.

In the case at bar, the Madison School Board was found guilty of committing an unfair labor practice when it allowed a non-union teacher to speak at an open, public meeting of the Board. The teacher also

sought to present a petition to the Board. The Wisconsin courts reached this conclusion by finding that the presentation by the teacher constituted "negotiating" with persons other than the representative of the exclusive bargaining unit.

It is undisputed that public employees, including teachers, retain their First Amendment rights. *Pickering*, 391 U.S. at 568; *Shelton v. Tucker*, 364 U.S. 479 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

> At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering v. Board of Education*, 391 U.S. at 568.

It is necessary to examine whether the Wisconsin Supreme Court properly balanced the interests of the teacher in commenting upon matters of public concern, and the interests of the state in stable public employee labor relations, particularly where it is clearly established that the burden lies on the state to justify regulation of substantial freedoms, such as those protected by the First Amendment.

The Wisconsin Court reached this decision by use of an expansive definition of "negotiating", a definition which could reach all public comment on any matters subject to collective bargaining by any member of the bargaining unit.

The constitutional rights at issue in this litigation are those of Free Speech, the Right of Petition, the Right of Association and the Right to Equal Protection of the Law.

The Court's imposition on free speech and petition was premised on the content of that speech, matters subject to collective bargaining. It has long been established that restrictions premised on content are precisely what the First Amendment forbids. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). The rule, as promulgated by the Wisconsin courts, has the effect of silencing differing perspectives on issues of public importance. This goal, the encouragement of comment on public issues, was the basis of this Court's decision in *Pickering*.

There is no doubt that the state has a legitimate interest in regulating speech, and speech related activities. Again, the question arises whether the state's interest can reach so far as to reach the result in the case at bar. Regardless of the proffered state interest, action which is aimed directly or which results in a restraint on protected freedoms or conduct bound to those freedoms must be stricken as unconstitutional *per se*, and should never be justified by a balancing approach. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960).

The Wisconsin Court's use of constitutional "clear and present danger" cases is wholly inappropriate to the facts of this case. Legitimate comment on public issues is not shouting "fire" in a crowded theater, (*Schenck v. U.S.*, 249 U.S. 47 (1919)), nor do the facts of this case indicate that Holmquist used "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The

cases cited by the Court are themselves instructive of the inadequacy of the imposition of this rule on this activity. In *Schenck v. U.S.*, 249 U.S. 47 (1919), this Court considered the use of restriction on free speech in connection with espionage and conspiracy in wartime. In *Dennis v. United States*, 341 U.S. 494 (1951), this Court considered restrictions on advocacy in a national security setting. Finally, this Court refused to uphold a state requirement that students salute the flag in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). The facts of the case at bar relate to grave interests of the state, but those interests are not as grave as national security and espionage. The "clear and present danger" cases cited by the Wisconsin Court simply do not establish a principle for limiting First Amendment rights in this case.

This Court has, in a variety of cases, established other principles, more applicable to the case at bar, relating to governmental infringement on First Amendment rights in light of an existing, legitimate state interest. *Tinker v. DesMoines School District*, 393 U.S. 503 (1969); *United States v. O'Brien*, 391 U.S. 367 (1968), *Adderly v. Florida*, 385 U.S. 39 (1966); *Pickering v. Board of Education*, 391 U.S. 563 (1968). In the cited cases, and others, this Court has looked variously at a "balancing" test, an "overbreadth" test, and a "least drastic means" test. These cases are also important for they discuss the role of governmental infringement of free speech in settings where the regulation has some valid purpose completely independent of the regulation of speech. Most importantly, these cases discuss the regulation in relation to a presumption that the regulation should not reach First

Amendment rights except to the extent absolutely necessary to fulfill the legitimate state purpose.

On the facts of this case, the regulatory interest, while sufficient in theory, must still fall "because the communication . . . integral to the conduct is itself thought to be harmful." *United States v. O'Brien*, 391 U.S. at 382. Such a bootstrapping theory cannot be heard to justify infringement on important constitutional protections.

2. The significance of the public forum and the need for vigorous comment on issues of public importance require that the solution to the case at bar include the most extensive protections available for First Amendment rights.

This case arose from occurences at an open, public school board meeting. If nothing else, such a meeting constitutes a "public forum." This Court, on numerous occasions, has faced issues relating to public fora. In a number of those cases, this Court was called upon to decide whether a given setting was a "public forum," where constitutional protections are fully available to those wishing to engage in public expression. *Marsh v. Alabama*, 326 U.S. 501 (1946); *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968). The present case presents no such problem.

The notion that individuals have an absolute right to use some public area for speech and assembly, the "public forum right," has been delineated by this Court in several cases beginning with *Hague v. CIO*, 307 U.S. 496 (1939). See also, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); Comment, "Public School as Public Forum," 54 *Tex. L. Rev.* 90 (1975);

Stone, "Fora Americana: Speech in Public Places," 1974 *Sup. Ct. Rev.* 233.

This Court has found that reasonable regulation of the "time, place and manner" of the exercise of free speech rights is permissible so long as the regulation is not designed to, or has the effect of, discriminating on the content of any given speech or on the identity of the speaker. *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Cox v. Louisiana,* 379 U.S. 559 (1965). As the School Board meeting was a public meeting, and Holmquist spoke during the time reserved for public comment on matters of public interest, it appears that no restrictions regarding "time, place and manner" of speech would be appropriate if applied to the facts of this case. In fact, a public meeting of a public body, convened to discuss issues of public importance represents the quintessential public forum. It is difficult to think of any other gathering where protections for the right to speak and petition are more appropriate or more consistent with the doctrine of the public forum.

Similarly, this Court has affirmed the need for uninhibited, robust and wide open debate on issues of public importance and recognized the significance of the "citizen-critic," in democratic government. *New York Times v. Sullivan,* 376 U.S. 254 (1964); and see *Pickering v. Board of Education,* 391 U.S. 563 (1968), where these principles were discussed in relation to public employment; Shaw and Clark, "The Practical Differences Between Public and Private Sector Collective Bargaining," 19 *UCLA L. Rev.* 867 at 999 (1972). The "citizen-critic," whether a private citizen or a public employee, holds an esteemed position in our governmental structure. "It is as much his duty to criticize as it is the officials duty to administer." *New*

York Times v. Sullivan, at 282. Certainly Holmquist was discussing issues of public importance, issues on which debate should be wide open. His appearance at the meeting was not even in the role of a critic, but, rather, as a conciliator, seeking deferral of the fair share proposal pending an impartial, public study of the issue. This is precisely the type of activity this Court has sought to protect, and is in the best First Amendment tradition.

As the primary purpose of the public meeting was to discuss matters of public importance, it is difficult to say that Holmquist's speech was disruptive of the primary purpose of the meeting. The mere fact that Holmquist's speech touched on labor relations is not, of itself, sufficient to restrict his right to speak absent a showing of disruption of the primary purpose of the meeting. Compare *Police Department of the City of Chicago v. Mosley,* 408 U.S. 92 (1972), with *Grayned v. City of Rockford,* 408 U.S. 104 (1972); and see *Tinker v. DesMoines School District,* 393 U.S. 503 (1969).

To the extent that there was disruption of the activities of the meeting, that disruption is wholly attributable to the activities of the exclusive bargaining agent, Madison Teachers, Inc. The Supreme Court determined that this meeting, an open, public meeting of the Madison School Board, became a "part of the negotiation process," thus, the Court reasoned, the statement by Holmquist constituted "negotiating," in violation of the exclusivity principles of the Wisconsin Statutes. *City of Madison, Joint School District No. 8, et al., v. WERC, et al.,* 69 Wis.2d 200, at 213, 231 N.W.2d 206, at 213 (1975).

In reaching the determination that the meeting was a "part of the negotiation process," the Court cited four facts: 1) that an impasse had been reached; 2) that the majority union had several members present; 3) that the majority union had pickets present; and 4) that representatives of the majority union addressed the board on subjects of the collective bargaining negotiations. 69 Wis.2d at 213, 231 N.W.2d at 213. Each of these conditions, with the possible exception of the impasse, was completely within the control of the majority union, the exclusive bargaining agent.

It is incongruous that the majority union, which alone had the right and the power to meet behind closed doors and negotiate with the Board on all matters subject to collective bargaining, could convert an otherwise open, public meeting into a "negotiation session," thereby, under the ruling of the Wisconsin Supreme Court, depriving non-union members of constitutional rights as well as possibly putting the Board in the position of violating the State's "sunshine," open meeting law. In similar situations, this Court has held that, to the extent possible, it is the duty of government to restrain the disruptors in protecting the free speech rights of citizens. *Gregory v. Chicago*, 394 U.S. 111 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

The principles relating to the public forum and the need for wide open debate on public issues require reversal of the decision of the Wisconsin Supreme Court in this case.

3. As an agent of the State, the Madison School Board is obligated to treat all citizens, who participate in a public meeting, regardless of their employment status or their union status, equally. The decision of the Wisconsin Supreme Court in this case would require school boards to violate this responsibility.

As school boards are creatures of the State, and board members are public officers, the equal protection mandate of the Fourteenth Amendment is fully applicable to their activities. *Ex parte Virginia*, 100 U.S. 339 (1880).

While public officials may have the discretion to discriminate in the performance of certain functions, they must first demonstrate a rational and necessary relationship between the discrimination and a compelling state interest. Particularly, where fundamental constitutional rights are at issue, this Court is obligated to exercise "strict scrutiny," holding the State to a standard of "high need." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

In the case at bar, no "high degree of need" exists, and the standard which the Wisconsin Supreme Court decision would impose exceeds permissible discriminatory conduct. Affirmance of that decision would have the effect of ignoring the differences between the exclusive bargaining role of the recognized union and the role of that union as a rival to a minority competitor. It would subject minority unions and individual employees to the unequal treatment proscribed by the Fourteenth Amendment. The concept of exclusivity and the benefits derived from such recognition must be reasonably related to the attainment of permissible objectives. *Railway Employes'*

Department v. Hanson, 351 U.S. 225, 233, 235 (1956); c.f. *Virginian Railway v. System Federation No. 40*, 300 U.S. 515, 558-59 (1937). The deprivation of constitutionally protected speech and petition – rights fundamental to the operation of our political process – is not a permissible objective. The Wisconsin Supreme Court itself recently noted this distinction:

> Those rights or benefits which are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be granted to entrench such organization as the bargaining representative.
>
> *Board of School Directors v. Wisconsin Employment Relations Commission*, 42 Wis. 2d 637, 649, 168 N.W.2d 92, 97 (1969).

In the same matter, the Court noted that while the exclusive use of school bulletin boards and teacher mailboxes was not on appeal before it, the Wisconsin Employment Relations Commission had determined and the circuit court had affirmed that, insofar as the use of the physical facilities of the school was related to normal union activities, the privileges had to be extended to the minority union if granted to the majority. *Board of School Directors*, 42 Wis. 2d at 642 n. 3, 168 N.W. 2d at 94 n. 3. See also *Avondale School District Board of Education*, 1968 Mich. L.M.B. Ops. 518, 525. It is difficult to draw a distinction between the disparate treatment prohibited in the cases cited above, and the effect the Wisconsin Supreme Court decision would have in public meetings where matters of collective bargaining are on the agenda. The effect is to permit the exclusive representative to speak at open public meetings, and to exclude comment from

employees in the bargaining unit if it does not conform to the policies espoused by the majority union. This is nothing less than arbitrarily denying individual teachers who choose to dissent from the union position the conveniences, advantages and fora in exercising speech and association rights. The fact that the Wisconsin statute itself did not authorize such discrimination is irrelevant, if, in its implementation it is applied so. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Ex parte Virginia*, 100 U.S. 339 (1880); *Lombard v. Louisiana*, 373 U.S. 267 (1963); *United States v. Classic*, 313 U.S. 299 (1941).

In the instant matter, the distinction drawn is not justified by a compelling state interest.

III.

BOTH IN TERMS OF VIOLATING FIRST AMENDMENT RIGHTS OF FREE SPEECH, PETITION AND ASSOCIATION, AND IN TERMS OF THE PRACTICAL APPLICATION OF LABOR LAW PRINCIPLES TO THE PUBLIC SECTOR, THE DECISION OF THE WISCONSIN SUPREME COURT MUST BE REVERSED.

As the discussions thus far have indicated, the rights of a minority union and individual employees should initially be measured against the First Amendment rights to speak freely, to assemble peaceably, to petition, and to associate, guaranteed against infringement by either the federal or state governments. See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). In *Thomas v. Collins*, 323 U.S. 516 (1945), the Court held that the

"grievances for redress of which the right of petition was insured" are not confined to religious or political causes, but include other fields of human interest including business or economic activity. It has also been demonstrated that the freedom of individual employees organized into a minority union to speak out on subjects concerning the employment relationship is constitutionally protected. *Pickering v. Board of Education*, 391 U.S. 568 (1968).

The conclusion we draw in this matter on the basis of these arguments is that the Wisconsin Employment Relations Commission and Wisconsin court's interpretation of the facts in this case infringes upon an individual public employee in the exercise of First Amendment rights beyond permissible constitutional limits, regardless of the test applied; and further, this infringement is not required by a reasonable application of labor law principles. The legitimate and compelling state interest served by the exclusivity provision of the Wisconsin Statutes is outweighed by the manner and degree that First Amendment rights are infringed.

Resolution of the case at bar may be assisted by a scrupulous assessment of Wisconsin case law preceding this litigation. The dispositive issue in those cases as in the case before the Court is what constitutes and limits collective bargaining for the purpose of reaching an agreement between an employer and the recognized exclusive representative.

The scope of the exclusivity provision of the Wisconsin Statutes, Sec. 111.70 was also at issue in *Milwaukee Teachers Union*, Dec. No. 6995-A at 12-13 (WERB, March 24, 1966)., *rev'd in part sub nom Board of School Directors v. W.E.R.C.*, 42 Wis. 2d 637, 168 N.W. 2d 92 (1969). Milwaukee Teachers Educational

Association [hereinafter MTEA] was designated exclusive collective bargaining agent by the Wisconsin Employment Relations Board [hereinafter WERB]. After the Board of School Directors for Milwaukee had entered into contract negotiations with MTEA, a teacher, *acting as a representative* of the minority, Milwaukee Teachers Union [hereinafter MTU], was denied an opportunity to speak on negotiable matters at a public meeting of a committee of the school board. Because representatives of groups other than the MTU had been permitted to speak on such matters at that meeting, MTU filed a complaint against the school directors with WERB. The Board determined that the denial of the right to speak was unlawful and ordered the school directors to cease and desist from depriving any member or representative of an employee organization of the opportunity to be heard "at any public meeting held for any purpose." *Milwaukee Teachers Union*, Dec. No. 6995-A at 8. In support of its decision, the Board adopted the rationale that a public hearing is not a forum for collective bargaining in public employment. *Milwaukee Teachers Union*, Dec. No. 6995-A at 17. The Board concluded that an appearance by a minority union at a public hearing could not be equated with an attempt at collective bargaining even though the hearing agenda involved negotiable subjects. The concept of collective bargaining in public employment, as elsewhere, must be restricted to a give and take relationship between the public employer and the exclusive representative "across the 'bargaining table'." *Milwaukee Teachers Union*, Dec. No. 6995-A at 17.

The decision of the WERB was reversed on appeal by a circuit court (*Board of School Directors v. WERC*, 42

Wis.2d 637, 643-44, 651, 168 N.W.2d 92, 95, 98-99 (1969), and the Wisconsin Supreme Court affirmed the reversal, 42 Wis.2d at 654, 168 N.W.2d at 100 (1969)). In its opinion, the Supreme Court concluded that the public employer engages in prohibited collective bargaining whenever it permits a representative of a minority union to speak on negotiable subjects during a private or public *negotiating* session, (emphasis supplied). *Board of School Directors v. WERC*, 42 Wis.2d at 651-54, 168 N.W.2d at 99-100. Contrary to the decision of the WERB, the Court held that the collective bargaining process included the open hearing required by the anti-secrecy law, at which the governmental body *acts* on an agreement negotiated between its agent and the exclusive representative. The Court's rationale was that permitting a minority union to express its views on negotiable subjects during what amounts to a negotiating session would defeat the purpose of designating the majority union as exclusive bargaining representative.

We would argue, however, that the Court went too far in imposing the exclusivity principle on an area of free speech and petition protected by First Amendment guarantees. An appearance at a mandatory public meeting is hardly the negotiation of wages and conditions of employment, see Section II. C. 2. above. Particularly, in the case at bar, the negotiation of the agreement was continuing to take place in private sessions without the interference of any minority unions or individual employees. It would be purposeless for a minority union, individual employee or interested citizen to address a public body without the intent to influence its thinking, but the public employer is under no obligation to reply to or treat with that interested party.

The privileges afforded a minority union or individual teacher under these circumstances is no stronger than that expressed in the basic right "to assemble, and to petition the Government" guaranteed by the First Amendment of the Federal Constitution and article I, section 4 of the Wisconsin Constitution.

To deny only a minority union or non-union teacher the right to appear and to speak before a public meeting of the governmental body as the Wisconsin Superme Court did in the Milwaukee Teachers case, and as it would do in the instant matter precludes public comment by an organization or individual with a real and immediate stake in the outcome of the deliberations. Furthermore, it defeats the policy of anti-secrecy laws – of public access "to the fullest and most complete information regarding the affairs of government" during public meetings "open to all citizens at all times." Wis. Stat. Ann., Sec. 14.90(1) and (2) (Supp. 1969).

It is doubtful that the exclusivity concept was intended to protect majority unions from public comment of the nature described in this case. It is also speculative to think that the collective bargaining process will be undermined by permitting speech or petition as undertaken in this matter. Moreover, denial of the right to speak and petition violated not only First Amendment guarantees absent a compelling state interest, but also may violate under the facts of this case statutory provisions protecting the public employee's equal right and access to channels of communication made available freely to the majority union or other organizations. *Healy v. James*, 408 U.S. 169 (1972); *Michigan City Federation of Teachers, Local 399 v. Michigan City Area Schools*, Civ. No. 72594 (N.D. Ind.), Jan. 24, 1973. See Section II.C.3. *supra*.

In addition to the pure constitutional arguments, common sense and practical definitions of "negotiation" weigh heavily against its application to the exchange taking place in this case. As contained in Wollett and Chanin, *The Law and Practice of Teacher Negotiations*, The Bureau of National Affairs, Washington, D.C. at p. 1:5:

> The process [of negotiation] is one of proposal and counterproposal, of action and reaction, of give and take – resulting finally in a 'deal' or 'no deal', in mutual agreement or stalemate . . . Bilateral determination of the terms and conditions of employment through the process of negotiations means that neither party has the ability to impose its will on the other and that each is able, in law and in fact, to veto the proposals of the other.

A letter from the Attorney General of Massachusetts to the Commissioner of Education supports this narrow interpretation of "negotiation":

> A collective bargaining session . . . is a meeting at which the employer and employees are engaged in a process of an interchange and analysis of each other's proposals and counterproposals. Att'y Gen. of Mass. – Letter to Com'r of Education, Owen Kiernan, Sep. 12, 1967.

This case presents the precise circumstances in which the Supreme Court of Wisconsin drew the following conclusion:

> If this case involved solely the giving of a position statement at an ordinary meeting of a public body, we would have some difficulty in labelling the conduct 'negotiating.' *Board of School Directors v. WERC*, 42 Wis. 2d at 651, 168 N.W. 2d at 99.

The case at bar was a regular public meeting at which the only exchange between members of the school

board and the minority teacher was the presentation by the teacher of the position statement. As such, anyone would "have some difficulty in labelling the conduct 'negotiating'." The fact that the majority union had pickets present outside the meeting hall, and that one of its spokesmen was permitted to address the school board does not operate to convert a scheduled public meeting mandated under state anti-secrecy laws into a collective bargaining session. If anything, the conduct of the majority union in monopolizing the atmosphere and platform of such a session should militate in favor of permitting speech from varying perspectives.

Constitutional and practical dictates favor a reversal of the Wisconsin Supreme Court decision.

CONCLUSION

For the reasons stated above, the decision of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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